

Resolution No.: 16-892
Introduced: March 17, 2009
Adopted: March 17, 2009

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: County Council

SUBJECT: APPLICATION NO. G-849 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Stacey P. Silber, Esquire, Attorney for Fifty LLC, Applicant, OPINION AND RESOLUTION ON APPLICATION
Tax Account Nos. 9-1-772871, 9-1-776297, 9-1-772882, 9-1-769463, 9-1-769452, 9-1-778593, 9-1-776286, 9-1-778525, 9-1-778514 and 9-1-778503

OPINION

Application No. G-849, filed on February 8, 2006 by former Applicant Winchester Homes, Inc., requests reclassification from the R-90 Zone to the RT-8 Zone of 4.91729 acres of land on the north side of Darnestown Road, approximately 400 feet west of its intersection with Travilah Road, comprising properties located at 10113, 10119, 10123, 10127, 10131, 10201, and 10207 Darnestown Road, Rockville, Maryland, in the 9th Election District.

The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits a Schematic Development Plan (SDP), with binding limitations with respect to land use, density and development standards or staging. The SDP for the proposed developments calls for 39 townhouse units, five of which would be moderately priced dwelling units (MPDUs).

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") who, in a report dated June 9, 2006, recommended approval. The Montgomery County Planning Board ("Planning Board") originally considered the application on June 22, 2006 and, by a vote of 3 to 1, recommended approval, but indicated its concern about the need

for “noise mitigation for the areas adjoining the Public Service Training Academy [PSTA].” After a public hearing on June 26, 2006, and supplemental filings, the Hearing Examiner recommended approval in a report dated October 13, 2006. The case was remanded by the Council to the Planning Board on October 26, 2006, also because of the noise concerns. The remand order directed the Planning Board to conduct a more detailed analysis of the compatibility of present and future PSTA activities with proposals for the subject site, including the impact of noise generated by the PSTA.

The remand order further instructed the Hearing Examiner, upon receipt of the Planning Board’s new analysis and recommendations, to reopen the record, provide for public comment or an additional hearing and to submit a supplemental report and recommendation. Given the extensive changes proposed by the current Applicant, the Hearing Examiner elected to hold an additional public hearing.

The original Applicant, Winchester Homes, Inc, withdrew after the remand, and the new Applicant is “Fifty LLC,” which is a part owner of the site, and acts with permission of the other owners of the site. The development will be called “Darnestown at Travilah.”

The new Applicant revised the proposed arrangement of the townhouses on site and added a berm, topped by a fence, between the proposed townhouses and the PSTA, as well as other screening and noise reduction measures. Additional expert analysis of the noise situation was obtained, and the whole matter was re-reviewed by Technical Staff and the Planning Board.

On December 1, 2008, Technical Staff issued a report (Exhibit 64) recommending approval of the revised Schematic Development Plan, but with the transformation of all but four of the binding elements into “Design Elements to be addressed at site plan.” On December 11, 2008, the Planning Board voted unanimously to recommend approval of the revised SDP, but with additional changes to the proposed binding elements. These changes were intended to maintain the Planning Board’s flexibility in approving or imposing design changes during site plan.

A remand hearing was held, as scheduled, on December 22, 2008. The only opposition testimony came from the next-door neighbor who felt that the construction of townhouses might lower the property value of his residence, which also houses his dance studio. Martin Klauber, Esquire, the People's Counsel, participated in support of the revised application. The record closed on January 16, 2009.

The Hearing Examiner, in a "Report and Recommendation on Remand" dated February 25, 2009, recommended approval of the application on the basis that the proposed development would satisfy the requirements and the purpose clause of the RT-8 Zone; that the proposed reclassification and development would be compatible with existing and planned land uses in the surrounding area; and that the proposed reclassification bears sufficient relationship to the public interest to justify its approval.

The District Council incorporates herein the Hearing Examiner's Report and Recommendation on Remand, and adopts the Findings and Conclusions contained therein. Based on its review of the entire record, the District Council finds that the application does meet the standards required for approval of the rezoning and the requested schematic development plan (Exhibit 78(f)), for the reasons set forth by the Hearing Examiner.

The subject property consists of ten parcels with a combined area of approximately 4.92 acres. The site is located on the north side of Darnestown Road between its intersections with Travilah Road and Key West Avenue, and has approximately 757 feet of frontage on Darnestown Road. The topography reflects a decrease in elevation from the northeast corner of the site to the southwest corner, adjacent to Darnestown Road. The property is currently developed with single-family detached dwellings of various types and sizes, and has seven individual driveways accessing Darnestown Road. The site contains a few mature trees, but no wooded areas that qualify as forest.

To the north, the subject property abuts a county-owned Public Service Training Academy ("Training Academy" or "PSTA") that serves as a centralized location for specialized training of public

safety employees, particularly police officers and fire fighters. Since 2001, the Training Academy has also been used for staging and training related to homeland security. It includes classroom space, an outdoor course for driver training, an outdoor space dedicated to training fire fighters, a canine training facility and an unpaved area used as a helicopter landing site.

In early 2006, the Planning Board approved a proposal to develop additional facilities at this site, including an expansion of the academic building, construction of a new fire station, construction of a new canine support facility with 1,350 square feet of offices and kennels, paving the helicopter landing site, and adding 220 parking spaces to the existing 107 spaces. As will be discussed below in connection with the “surrounding area,” plans are underway to relocate the PSTA, and many of the improvements approved in 2006 have not taken place.

To the west, the subject property abuts a medical office building in the O-M Zone. To the east it abuts a single-family, detached dwelling in the R-90 Zone that has a residential unit upstairs, and a dance studio operating by special exception on the ground level. It is owned by Schain Lolatchy, the only opponent to this development.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

In the present case, Technical Staff defined the surrounding area as bounded generally by Key West Avenue (MD 28) on the north and west, Great Seneca Highway (MD 119) on the northeast, Travilah Road on the southeast, the southern boundary of the BAI-Nola Woods Subdivision on the south, and the western boundary of the Hunting Hill Woods Subdivision on the west. Applicant’s land planner and the Hearing Examiner accepted the same definition, and the District Council finds that Technical Staff’s suggested definition of the surrounding area is appropriate.

The surrounding area, as described above, contains a mix of residential, institutional and office uses in the R-90, R-90/TDR, R-200, R-200/TDR, RT-10, O-M, C-3 and LSC Zones. The residential uses, made up mostly of single-family detached homes in the R-200 and R-200/TDR Zones, and townhouses in the RT-10 Zone, are located in the southern portion of the neighborhood, south of Darnestown Road. A major part of the northern portion of the neighborhood is occupied by the PSTA, in the R-90/TDR Zone. The northern portion of the neighborhood also contains a small retail center in the C-3 Zone, at the intersection of Darnestown Road and Key West Avenue, a medical office building in the O-M Zone, adjacent to the site, and the Maryland Technology and Development Center, in the LSC Zone at the northwest corner of Great Seneca Highway and Darnestown Road. Immediately to the east of the subject site are the adjacent residence/dance school special exception, a large child day care/school special exception abutting the residence/dance school, and a PEPCO substation, all in the R-90 Zone.

The proximity of the PSTA to the subject site was the main reason for the remand in this case, so its current status and likely future are important to this evaluation on remand. The current status of the PSTA was discussed at the remand hearing, and the District Council finds that many of the changes planned for PSTA site have not actually been constructed. Also, much of what actually occurs at the PSTA is quite far away from the subject site. Perhaps more importantly, the noise issues may end up being a moot point because of the real possibility that the PSTA will be relocated.

This possibility was discussed extensively in both the Remand Technical Staff report (Exhibit 64, pp. 3, 11-13), and in an Addendum to Applicant's Land Use Report (Exhibit 57(b), pp. 1-5). Attached to the Addendum are copies of the Montgomery County Executive's August 2008, "Montgomery County Property Use Initiative" and Technical Staff's September 24, 2008, memorandum to the Planning Board on the status of the Gaithersburg West Master Plan, which ultimately may replace the 1990 Shady Grove Study Area Master Plan currently applicable to the subject site.

The Montgomery County Executive's "Property Use Initiative" recognizes that the PSTA "has severe space limitations and is in need of tens of millions of dollars in improvements just to stay at its current location." The Initiative proposes moving the PSTA to another site and developing a "New Science City" on the PSTA site, which would integrate mixed-use residential uses with the life science center developing in the area.

Technical Staff's September 24, 2008, Memorandum to the Planning Board on the status of the Gaithersburg West Master Plan (at p. 8) agrees with the County Executive's conclusion that the PSTA should be moved, stating "From a land use perspective, staff has long believed that the PSTA is no longer properly located. . . . Staff considers the PSTA site to be an excellent location for a new, transit-served residential community."

The impact of the likely removal of the PSTA was further discussed in the Remand Staff Report (Exhibit 64, p. 13):

The second part of the remand is to evaluate any future, potential noise impacts of PSTA operations on the residential use of the subject parcel. According to the applicant, public pronouncements by the County Executive's Office, the County Council, and from staff briefings to the Planning Board make it clear that the PSTA will eventually move to another location, making the issue of noise compatibility moot. The PSTA is unlikely to add operations to the current facility closer to the subject site as that portion of the PSTA is currently developed. If those uses described in the PSTA's Mandatory Referral were as noted below we still believe the PSTA is compatible with the subject Local Map Amendment.

Even if the PSTA were to remain at its present location, Technical Staff concludes that "[t]he PSTA is unlikely to add operations to the current facility closer to the subject site [, and] . . . the PSTA is compatible with the subject Local Map Amendment." Exhibit 64, p. 13.

The zoning history of the subject site is as follows. The subject property was classified under the R-R Zone (now R-200) in the 1958 Countywide Comprehensive Zoning. Sectional Map Amendment (SMA) G-502 reclassified the site from R-200 to R-90 in 1986. In 1987, it was reclassified to R-90/TDR

by SMA G-568. It was reclassified back to the R-90 Zone by SMA G-725 in 1996, and the R-90 Zone was reconfirmed by SMA G-800 in 2002. Thus, the site is presently in the R-90 Zone.

The Applicant proposes to raze the existing structures on the site and build a townhouse community with a maximum of 39 units, including the 12.5 percent Moderately Priced Dwelling Units (“MPDUs”) required under Chapter 25 of the Montgomery County Code. The layout shown on the revised Schematic Development Plan (“SDP”) is illustrative and may change at later stages of review. Applicant’s current plan, like its pre-remand plan, calls for 34 market-rate units, each with a two-car garage and two driveway parking spaces, and five MPDUs, each with a one-car garage and one driveway parking space. However, that is where the similarity ends.

In the pre-remand plan, the townhouses were to be divided into seven groups, facing in various directions. Unlike the pre-remand plan, the revised SDP (Exhibit 78(f)) has most of the units facing onto an open space or green area abutting Darnestown Road. Applicant has also proposed an eight-foot high forested berm, topped with a six-foot high solid wood fence to serve as a visual and noise barrier between the proposed townhouses and the PSTA. The revised Schematic development plan offers improved on-site circulation, less impervious surface, more landscaping and more screening and buffering features than that previously proposed.

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as

legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment.

One of the issues in this case is whether the binding elements should consist of the thirteen elements Applicant is willing to be bound by or just two or three of those binding elements, with the remainder designated on the SDP as "Design Elements." A reduced number of binding elements was recommended by Technical Staff, the Planning Board, the People's Counsel and the Hearing Examiner to maintain the Planning Board's flexibility in approving or imposing design changes during site plan review. The District Council agrees with the recommendation to have only the three binding elements and the ten design elements contained in the final SDP (Exhibit 78(f)), given the great uncertainty as to the future use of the adjacent PSTA site.

Under the SDP (Exhibit 78(f)), the following items are binding elements as shown on the face of the plan and in the executed covenants (Exhibit 78(m)):

Binding Elements:

- a. The Applicant agrees to dedicate its proportionate share of the necessary right-of-way width along Darnestown Road, as recommended in the Shady Grove Study Area Master Plan, adopted in July 1990.
- b. Applicant agrees that an eight-foot shared path will be located within the public right-of-way, with final determination at time of Site Plan.
- c. Maximum density of 39 one-family attached dwelling units including a minimum of 12.5% MPDUs, and maximum building height of 35 feet.

The SDP design elements provide parameters for elements such as brick facades; landscape buffers; landscape design along Darnestown Road; on-site forest conservation; the proposed berm and noise wall; fencing; notification to potential homebuyers concerning the PSTA; parking restrictions; and compliance with county guidance regarding interior and exterior noise levels. They are:

Design Elements:

1. All units, including MPDUs, to have brick front facades. The two units with sides facing Darnestown Road shall also have brick facades.
2. Landscaping to be provided along the boundary of the property. Plant material and location to be determined at Site Plan review.
3. Landscape design along Darnestown Road to include, but is not limited to, intermittent masonry walls and/or piers, decorative fencing and screening landscape materials. The final landscape design shall be determined at time of Site Plan.
4. Applicant agrees to provide on the Property a minimum of 18,000 square feet of the required .74 acre (or 32,234 sq ft.) Conservation Easement as a Category II Conservation Easement. The actual Forest Conservation Areas to be determined at time of Site Plan.
5. Applicant will provide along the property's northern boundary line, adjacent to Parcel 925, a soil berm that is approximately 8' at its peak, and tapers to grade at either end, the extent of such berm to be determined at time of Site Plan. A 6' fence, constructed of wood or other appropriate material shall be provided on the berm (if such berm is deemed appropriate at time of Site Plan), with final design and location determined at time of Site Plan.
6. Applicant shall include notification in sales contracts to initial homebuyers, and in Homeowner Association Documents to Property's adjacency to the existing County Public Safety Training Academy, if applicable, which has approved uses, including, but not limited to a fire and rescue station, helipad, driver training course, burn building, an urban search and rescue area and canine training unit.
7. Building shell will be designed to achieve an average projected interior DNL of 45dB or lower in habitable rooms. The average projected ground-level exterior DNL will not exceed 65 dB in unit rear yards, the tot lot, and the seating area along Darnestown Road.
8. Applicant agrees to plant 6-8 foot evergreen trees along the Property's eastern boundary line, adjacent to Parcel 50. Exact location of evergreen trees shall be determined at time of Site Plan.
9. Applicant agrees to install a minimum 6 foot high wood fence along its eastern property line, adjacent to Parcel 50. The fence shall begin where the existing wood fence on Parcel 50 ends and shall extend, at a minimum, to the end of Lot 39. The exact fence location shall be determined at time of Site Plan.
10. Applicant agrees to include in Homeowner Association documents that parking by its residents is not permitted on Parcel 50.

This approval of the requested rezoning allows *up to* 39 dwelling units on the site, leaving open the possibility that the Planning Board may require a reduction in the number of units at a later stage of review.

As mentioned above, concerns about the impact of noise upon the proposed development were the driving force behind the Council's remand order. The Applicant's noise-related evidence prior to the remand focused mainly on roadway noise emanating from Darnestown Road. Those pre-remand noise studies had to be redone for two reasons. First, the Council's Remand Order required more detailed analysis of the noise impacts from the PSTA, and second, following the remand, the arrangement of the residential units and other features on the subject site was dramatically changed, requiring a new analysis of the noise impacts from Darnestown Road traffic, as well as the PSTA. In addition, Applicant added a proposed eight-foot tall, landscaped berm, topped with a six-foot tall solid wood noise wall or fence,¹ along the northern border of the site, to insulate residents from noise generated by the PSTA.

The new noise analyses performed by Applicant's noise expert are contained in two reports by "Hush Acoustics, LLC," Exhibit 54(k), with regard to Darnestown Road noise, and 63(a), with regard to PSTA noise. These studies were discussed in some detail during the remand hearing (testimony of Gary Ehrlich, Applicant's expert in acoustical engineering, Remand Tr. 100-140) and were analyzed at length in the Remand Staff Report. *See* Exhibit 64, pp. 11-16, and the November 20, 2008, Memorandum of Environmental Planning Staff, attached to the Remand Staff Report.

Mr. Ehrlich testified that the current plan improves the previous plan from an acoustical perspective in a number of ways. The units in the middle of the site are farther from Darnestown Road, and the rear yards are shielded from noise from Darnestown Road by the townhouses themselves. Noise walls along the corners and middle of the subject site will further insulate the development from

¹ The terms "noise wall" and "fence" are used interchangeably when referring to the solid wood fence which will top off the planned berm, because acoustical experts use the term "wall" when referring to a fence or wall that is "acoustically solid," whether it is composed of concrete, wood or metal, while "to an acoustical person a fence means it has some sort of gaps in it." Remand Tr. 103, testimony of acoustical engineer, Gary Ehrlich.

Darnestown Road noise, and the addition of a landscaped berm and six-foot noise wall on the northeast side of the property shields it from noise generated by the PSTA.

In terms of the PSTA noise, Mr. Ehrlich installed sound level meters in two locations, at the border between the PSTA and the subject property, and left them there for a typical two week period. Sounds emanating from the PSTA were evaluated under the Montgomery County Noise Ordinance. The Noise Ordinance, Chapter 31-B of the County Code, includes a maximum allowable sound level of 65 decibels during the day time in residential zones and 55 decibels at night in residential zones. Those are readings external to the structures because there is no requirement governing internal noise in the Noise Ordinance.

During the two week noise monitoring period, Mr. Ehrlich logged 193 events that produced audio recordings over 70 decibels from all sources, including sirens, birds, thunder, et cetera, and of those 193 only 18 were in any way attributable to the PSTA. Thus, about nine exceedances per week could be identified as being from the PSTA, and typically, they lasted two or three seconds. Some recorded events, such as sirens on Darnestown Road were long, but in terms of the events associates with the PSTA, they were all very short events. Some of them were just a single impulse like that concrete anchor shot, which just sounds like a pop, and some of them were horn tooting lasting two or three seconds. PSTA does not have an outdoor shooting range; they have an indoor shooting range, but there is no reason to think that it is noisy based on the sound level data.

There were no PSTA exceedances at night, but one of them was at 7:55 a.m. on a Saturday, which is technically "night" because the Saturday definition of night lasts until 9 a.m. Thus, of those 18 events, one was minimally during the nighttime by strict definition of the Code. If the sound level from some nighttime PSTA related activity were in the range of 65 to 70 decibels, the addition of the proposed 14-foot berm/wall combination would easily reduce that 5 decibels, which would push it under the County Noise Ordinance limit of 65 decibels.

Although there is no Noise Ordinance requirement limiting indoor noise, the 14-foot berm and fence combination will provide protection for the ground level and one floor up from PSTA noise, given the location of the Urban Search and Rescue area, which is the chief source of noise from the PSTA. The nearest unit (#25) is about 250 feet from the Urban Search and Rescue area. Moreover, PSTA outdoor noise on the loudest day averaged 62 decibels DNL² outdoors, so indoors, with typical building construction, it would be in the high 30s to low 40s, but certainly no more than 45 decibels DNL indoors.

Based on these findings, Mr. Ehrlich opined that from an acoustical perspective, the PSTA is compatible with proposed residential development. He noted that the types of noises that you hear are representative of what you would hear in a residential community, like occasional power tool use or even a siren going by. The sirens on the PSTA occur at distances similar to those of sirens that would go by a residential neighborhood, and the types of sounds generally heard are essentially representative of what would occur in a residential neighborhood.

In Mr. Ehrlich's opinion, even if the PSTA expanded pursuant to the previously approved plans, it would be compatible with the proposed residential development. For example, the proposed addition of a fire station is a relatively typical use. Typically, fire stations are not that far from residential communities that they serve. In this case, it would be a couple hundred feet from the townhouses, which would not be that unusual.³

Mr. Ehrlich also testified that, if the PSTA were redeveloped as a residential use or a mixed residential/commercial use, it would still be compatible. If there were an adjacent commercial use, having

² The "DNL" designation means that the noise in decibels is measured by an average day-night level (*i.e.*, a 24-hour average), rather than the instant decibel rating used in the County Noise Ordinance. The average noise level test comes from the "Staff Guidelines for the Consideration of Transportation Noise Impacts in Land Use Planning and Development", June 1983 (the "Transportation Noise Guidelines"), which were prepared by Technical Staff's Environmental Planning Division. *See* Ex. 42(f). The Transportation Noise Guidelines suggest maximum acceptable noise levels from transportation noises, which is why Staff asked the Applicant to apply them to evaluating the Darnestown Road noise, but not the PSTA noise.

³ If the County Executive's plans come to fruition, the fire station would actually be located much further away, along Great Seneca Highway, as shown on page 8 of the Montgomery County Executive's August 2008, "Montgomery County Property Use Initiative" (attached to the Addendum to Applicant's Land Use Report (Exhibit 57(b))).

a berm there would be a perfectly appropriate situation. If it were a residential use, the berm would be unnecessary.

Turning to the issue of noise from Darnestown Road, Mr. Ehrlich applied the Transportation Noise Guidelines. He noted that the 65 decibel DNL outdoor noise standard of the Transportation Noise Guidelines⁴ is typically applied in outdoor use areas such as rear yards, and on this site, the focus is on the rear yards of the townhouses oriented perpendicular to Darnestown Road.

The outdoor use areas would also include rear yards oriented away from Darnestown Road, but those are significantly shielded from Darnestown Road to the point that the sound levels are way below the County criteria, as is the Tot Lot between townhouses 10 and 11. Mr. Ehrlich's DNL Decibel findings regarding outdoor noise from Darnestown Road are summarized by Figure 6 in his report dated June 17, 2008 (Exhibit 54(k)).

Figure 6 shows that the sound level at the most impacted townhouses (*i.e.*, townhouses numbered 1, 38 and 39, which are closest to the road) will reach as high as 69½ to 70 decibels, DNL at the loudest floor. To address this noise, six-foot noise walls are proposed on the SDP. Wing walls (*i.e.*, walls shaped like an "L" and a backwards "L") at the southeast and southwest corners of the site would protect Units 1 and 39, and a V-shaped wall is proposed at the seating area in the middle of the site. In Mr. Ehrlich's professional opinion, with these walls, the noise level will be under 65 decibels in each of the rear yards and also in the seating area. Thus, the project, as proposed, satisfies the Montgomery County guidelines for exterior noise levels.

As to indoor noise levels, Mr. Ehrlich testified that typical building construction will reduce noise levels by 19 to 27 decibels. If a building reduces the noise level by 20 decibels, and the goal is 45 inside, that means with 65 decibels outside, the interior will be down to the required 45 decibel interior standard. If the exterior noise is up to 70 decibels, very modest upgrades to standard construction would typically

⁴ The day-night average Mr. Ehrlich calls "DNL" is referred to as $L_{dn} = xx$ dBA in the Transportation Noise Guidelines.

be necessary, such as limiting the types of windows and doors to reduce sound ratings. Mr. Ehrlich also doubts any upgrades would be required for any lots other than the four or five that are closest to Darnestown Road, even though some of them might slightly exceed the 65 decibel figure. Nevertheless, Applicant has agreed in Design Element No. 7 on the SDP (Exhibit 78(f)) that:

Building shell will be designed to achieve an average projected interior DNL of 45dB or lower in habitable rooms. The average projected ground-level exterior DNL will not exceed 65 dB in unit rear yards, the tot lot, and the seating area along Darnestown Road.

Mr. Ehrlich concluded that the proposed project will meet the *Park and Planning* standards with regards to noise, and that the subject townhouse community is compatible with the adjacent users from a sound perspective. He believes that for ground level listeners, the sound level would be less than 65 decibels in all the unit rear yards, and interior noise levels on all floors can be reduced to below 45 decibels on both sides of the project.

Technical Staff agreed with these conclusions. As stated on Page 1 of the November 20, 2008, Memorandum of Environmental Planning Staff, attached to the Remand Staff Report (Exhibit 64), and quoted therein at pp. 14-15,

The Environmental Planning Staff has reviewed the Remand of Zoning Application G-849 referenced above. In staff's professional judgment, sufficient evidence has been presented to make an affirmative finding that the residential use proposed in the zoning application is compatible with existing and planned PSTA operations. The principal reasons supporting this conclusion include:

- 1) The small number and percentage of peak noise events coming from PSTA operations as compared with others in the ambient environment;
- 2) The compatibility or *fit* of such sounds with others in the ambient environment (i.e., they are common, not unique; no discrete tonal qualities; not dominant by peak or number); and
- 3) The application has added significant mitigation to PSTA noise through a commitment to construct a landscaped noise berm/barrier. The ground floor of the townhouses can expect a minimum reduction of at least half of the perceived loudness.

In summary, noise from PSTA operations is deemed to be an acceptable impact to the proposed residential development on the subject site. [Emphasis added.]

Technical Staff made similar findings with regard to the Darnestown Road noise and the effects of the site redesign (Exhibit 64, p. 13):

Furthermore, the site was redesigned to provide greater noise compatibility from Darnestown Road, which the noise analysis indicates is the louder and most prevalent noise source affecting the property. This is a clear improvement from the application as it was originally proposed. The design of this new plan has more units parallel to Darnestown Road, creating a de facto noise barrier which tucks activity areas behind the dwelling units (decks, rear yards), and enhances the areas for privacy and quiet enjoyment at both the ground and upper floor areas. For those units that are perpendicular to Darnestown Road, the rear yards will have noise mitigation walls (wing walls) that face Darnestown Road and extend perpendicular to Darnestown Road. The applicant has considered architecturally-integrated walls/bump-outs – wing walls - (functioning as noise barriers) into the townhouse design to affect multi-story noise mitigation. This detail can be further evaluated in later stages. An additional community gathering area is planned central to the site: a noise wall is proposed to surround this area on three sides from the Darnestown Road side.

Both Technical Staff and the Planning Board agreed (Exhibit 65, pp. 1-2, paraphrasing Exhibit 64, p. 16):

The applicant has also submitted a significantly improved schematic development plan that depicts a coherently organized site design to mitigate potential off-site impacts, both from Darnestown Road and activities at the training academy. The revised plan represents a superior esthetic appeal and a more efficient on-site circulation than the previous plan. The revised plan, coupled with the applicant's written response and the noise analysis report, sufficiently addresses the four elements of the remand order. The proposed project would be appropriate for the site and would be compatible with existing development and future lands uses planned for the area. [Emphasis added.]

Based on the overwhelming evidence in this record, the Hearing Examiner agreed with the conclusions of Technical Staff and the Planning Board. The District Council finds that the record amply supports these conclusions. Some additional measures might require redesigning the site layout and/or reducing the number of units, but the layout as currently shown is illustrative, so the Planning Board will have the discretion to require such changes during a later stage of review.

The District Council turns next to the requirements of the RT-8 Zone and its purpose clause. As shown on page 32 of the Hearing Examiner's Report and Recommendation on Remand, the proposed

development would be consistent with applicable development standards for the RT-8 Zone. The District Council also concludes that the proposed rezoning would satisfy the RT-8 Zone's purpose clause.

The purpose of the R-T Zone is to provide suitable sites for townhouses (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are appropriate for residential development at densities that are allowed in the R-T Zones; or (3) where there is a need for buffer or transitional uses. While the Zoning Ordinance requires that only one of these three alternative criteria be satisfied, the Hearing Examiner agreed with Applicant's land planner, Alfred Blumberg, that in this case, all three have been satisfied. Remand Tr. 67-68.

The RT-8 Zone is recommended for this site in the 1990 Shady Grove Study Area Master Plan; it is appropriate for residential development at the density permitted in the RT-8 Zone because the site can accommodate a townhouse development compatible with surrounding area land uses and sufficiently insulated from noises generated by the PSTA; and it will serve as a transition between the PSTA use (or a new residential/commercial development to the north) and the townhouse and single-family uses south of Darnestown Road.

Part of the purpose clause indicates an intent to provide the "amenities normally associated with less dense zoning categories." Following the remand, the site layout was significantly redesigned, and the present SDP (Exhibit 78(f)) proposes more amenities for the residents, including a large open play area and a seating area in the front, a Tot Lot to the rear, and a Category II Forest Conservation Easement in the northwest corner, to which the residents will have access. Both *Technical Staff* and the *Planning Board* agreed (Exhibit 65, pp. 1-2), "The revised plan represents a superior esthetic appeal and a more efficient on-site circulation than the previous plan."

It is also the intent of the R-T Zone "to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole." Mr. Lolatchy, owner of the

adjacent property to the east, fears that the construction of a townhouse development on the subject site would be detrimental to the use of his property due to noise and traffic, and would cause its monetary value to decrease. However, his expectation of a decrease in property value is based on hearsay statements.

The Hearing Examiner found that Mr. Lolatchy's fears about a diminution of his property values have not been supported by any credible evidence. Moreover, the Hearing Examiner found that other concerns raised by Mr. Lolatchy – noise, problems with overflow parking and potential harm to his property during the construction process – have been appropriately addressed by the three design elements providing buffering along the eastern property line and prohibiting the development's residents from parking on Mr. Lolatchy's property. In addition, Applicant will provide more than double the number of required parking spaces on the subject site.

The District Council finds that the proposed development will not detrimentally affect the adjacent property to the east, currently owned by Mr. Lolatchy. This conclusion is bolstered by the common-sense observation that Mr. Lolatchy's property is already located on a block with several non-residential uses, and that the lots comprising the subject property are currently occupied by dilapidated buildings, which are eyesores.

There is no evidence to suggest that the proposed development would have any adverse effect on other adjacent or confronting properties or the neighborhood in general. The proposed townhouse development would blend well with the mix of residential and non-residential uses in the surrounding area, and would be very unlikely to adversely affect either the medical office building adjacent to the west, or the Training Academy to the north, both of which have more intense levels of activity than would be expected from the proposed development. If the PSTA is moved and replaced with a residential or a mixed residential/commercial community as has been discussed above, the proposed townhouses would still fit in well with the surrounding development. As stated in the Planning Board's letter recommending

approval on remand (Exhibit 65), "The proposed project would be appropriate for the site and would be compatible with existing development and future lands uses planned for the area."

Some of the residential uses across Darnestown Road are lower in density than the development proposed here, but any possible adverse impact from the proposed development would be mitigated by the width of the road, substantial vegetative buffering on the south side of Darnestown Road, and landscape buffering planned along the subject site's frontage.

For all of the above reasons, based on the preponderance of the evidence, the District Council concludes that the proposed rezoning and development would be consistent with the intent and purpose of the RT-8 Zone. As noted above, the proposed development is also consistent with all the development standards of the RT-8 Zone.

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. As noted in the Addendum to Applicant's Land Use Report (Exhibit 57(b), pp. 5-8):

The subject property will play an important transitional role between the existing one-family residential development south of Darnestown Road and the future redevelopment of the PSTA site. Both the newly proposed Gaithersburg West Master Plan and the County Executive's Property Use Initiative support the redevelopment of the PSTA property.

* * *

This proposed development will complement and complete the residential orientation of the portion of Darnestown Road between Travilah Road and Key West Avenue. This proposed development will complete the transition between the existing one-family residential development on the south side of Darnestown Road and either the PSTA activities or the proposed redevelopment of the PSTA site.

Technical Staff and the Planning Board agreed (Exhibit 65, pp. 1-2):

The revised plan, coupled with the applicant's written response and the noise analysis report, sufficiently addresses the four elements of the remand order. The proposed project would be appropriate for the site and would be compatible with existing development and future lands uses planned for the area.

As discussed above, the noise studies and the analysis thereof by both Applicant's acoustical expert and Technical Staff answer the questions raised by the Council in its remand order and demonstrate that the proposed townhouse development can appropriately exist adjacent to the PSTA or a combined residential/commercial use, if that replaces the PSTA.

Based on this record, the District Council agrees with the findings made by the Planning Board, the Technical Staff and the Hearing Examiner that the requested reclassification to the RT-8 Zone, and the development proposed, would be compatible with existing and proposed land uses in the surrounding area.

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment. Additional issues affecting the public interest may also be considered.

The Master Plan recommends reclassification of the parcels comprising the subject property (as well as additional nearby parcels) to the RT-8 Zone as an incentive for the consolidation and coordinated development of these parcels. The properties comprising the subject site are designated on the Master Plan's Land Use Map for residential development at a density of seven to ten units per acre, and on the Master Plan's Zoning Map as R-90/RT-8. The proposed development would also serve the Master Plan's general goals of providing for a broad mix of residential units, including affordable housing, and

providing a sense of community identity for both existing and future residences. As the Applicant's land planner pointed out, the proposed development would contribute to a good balance between detached and attached single-family homes in the surrounding area.

Technical Staff and the Hearing Examiner concluded that the requested reclassification and proposed development would substantially comply with the objectives and recommendations of the Master Plan. The District Council so finds.

As to public facilities, the evidence indicates that enrollment at the elementary and middle school levels will be within capacity. While enrollment at Wootton High School currently exceeds 105 percent of capacity and is projected to exceed capacity in the future, the remedy specified in ¶5 (at p. 20) of the 2007-2009 Growth Policy is a high school facilities payment to obtain subdivision approval. Moreover, the maximum of 39 dwelling units proposed here is expected to generate only four high school students. Under these circumstances, the minimal evidence of potential adverse effects on school overcrowding is not sufficient to warrant denial of the application. The evidence also demonstrates that the proposed development would not have any adverse effect on public roads, utilities or other public services.

Based on this record, the District Council concludes, as did the Hearing Examiner, that the proposed reclassification and development would have no adverse effect on public facilities warranting denial of the application. The District Council also agrees with the Hearing Examiner's finding that the proposed development would have no adverse effect on the environment. The Site is not in a Special Protection Area or Primary Management Area, and has no streams, wetlands or extensive areas of steep slopes. A Stormwater Management Concept Plan has been approved by the department of Permitting Services, and a Preliminary Forest Conservation Plan has been proposed. Stormwater management and forest conservation will be reviewed by the Planning Board at site plan and subdivision.

Finally, Technical Staff and the Planning Board both recommended approval of the post-remand SDP, finding that the current plan is a significant improvement over the pre-remand plan, and that all the

concerns raised by the Council in its remand order have been appropriately addressed. The Hearing Examiner agreed, as does the District Council.

For all of the above reasons, the District Council concludes, based on the preponderance of the evidence, that the proposed reclassification bears sufficient relationship to the public interest to warrant its approval.

Based on the foregoing analysis and after a thorough review of the entire record, the District Council reaches the following conclusions:

1. The application satisfies the requirements and the purpose clause of the RT-8 Zone;
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area; and
3. The requested reclassification to the RT-8 Zone bears sufficient relationship to the public interest to justify its approval.

For these reasons and because to grant the instant zoning application would aid in the accomplishment of a coordinated, comprehensive, adjusted and systematic development of the Maryland-Washington Regional District, the application will be granted in the manner set forth below.

ACTION

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-849, requesting reclassification from the R-90 Zone to the RT-8 Zone of 4.91729 acres of land on the north side of Darnestown Road, approximately 400 feet west of its intersection with Travilah Road, comprising properties located at 10113, 10119, 10123, 10127, 10131, 10201, and 10207 Darnestown Road, Rockville, Maryland, in the 9th Election District, is hereby **approved** in the amount requested and subject to the specifications and requirements of the final

Schematic Development Plan, Exhibit 78(f); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance, and provided that the Declaration of Covenants (Exhibit 78(m)) is filed in the County land records in accordance with § 59-H-2.54 of the Zoning Ordinance.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council